STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 10, 2011
v	No. 296114 Oakland Circuit Court
RICKY RUSSELL FULTON, Defendant-Appellant.	LC No. 2009-227299-FH

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree home invasion, MCL 750.110a(2), and resisting and obstructing a police officer, MCL 750.81d. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to prison terms of ten to 50 years for first-degree home invasion and two to 15 years for resisting and obstructing. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant broke into the apartment of an 84-year-old Roman Catholic priest. The priest called the police when he was unable to open the apartment door, which was blocked by a chair. A responding officer pushed the door open and saw defendant in the living room. A sliding glass door had been shattered. The officer and his partner entered the apartment as defendant tried to flee. As he was being subdued, defendant kicked one of the officers. Burglary tools and the priest's envelope containing $300 were found on defendant's person.

Defendant first argues that he was improperly convicted of first-degree home invasion. MCL 750.110a(2) provides

> (2) A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree *if at any time while the person is entering, present in, or exiting the dwelling* either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling. [Emphasis added.]

Defendant asserts that the Legislature did not intend for "another person" to apply to a police officer responding to the report of a break-in. However, a police officer is "[a]nother person," and as a responder, the officer would be "lawfully present in the dwelling." The statute therefore includes the police officer at issue here. We note that MCL 750.2 provides:

> The rule that a penal statute is to be strictly construed shall not apply to this act or any of the provisions thereof. *All provisions of this act shall be construed according to the fair import of their terms, to promote justice and to effect the objects of the law*. [Emphasis added.]

Defendant asserts that his interpretation of the statute would be consistent with the statute's purpose of protecting an inhabitant's "peaceful habitation." While this is a purpose of the statute, see *People v Rood*, 83 Mich App 350, 353; 268 NW2d 403 (1978), another reasonable concern addressed by the statute is that a criminal confronted in the home by a "person" might hurt that "person" in an attempt to protect identity or flee. Police officers who confront a burglar in the home would also be subject to this risk. Elevation of home invasion to the first degree based on the lawful presence of a police officer in the dwelling would effectuate the object of the law to the extent the purpose is to protect individuals as opposed to property.

Defendant contends that legislative intent cannot be discerned and that the "rule of lenity" should therefore be applied. The "rule of lenity" provides that a court should mitigate punishment if a criminal statute is unclear, but "'[t]he rule of lenity applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent.'" *People v Denio*, 454 Mich 691, 700 n 12; 564 NW2d 13 (1997), quoting *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). In *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008), the Michigan Supreme Court stated:

> Our goal in construing a statute is "to ascertain and give effect to the intent of the Legislature." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). The touchstone of legislative intent is the statute's language. "If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Accordingly, when statutory language is unambiguous, judicial construction is not required or permitted.[12] *Id*.

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[12] "[O]nly a few provisions are truly ambiguous and . . . a diligent application of the rules of interpretation will normally yield a 'better,' albeit perhaps imperfect, interpretation of the law . . . ." *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 166; 680 NW2d 840 (2004). A provision is not ambiguous just because "reasonable minds can differ regarding" the meaning of the provision. *Id*. at 165. "Rather, a provision of the law is ambiguous only if it 'irreconcilably conflict[s]' with another provision, or when it is equally susceptible to more than a single meaning." *Id*. at 166 (citation omitted). See *Klapp v United Ins Group Agency*,

Inc, 468 Mich 459; 663 NW2d 447 (2003), for an example of truly ambiguous contractual language.

The statute in the present case is not ambiguous. Moreover, the language implies that the intent was to define broadly the class of persons who might be present. The criteria for applying the "rule of lenity" do not apply, and the trial court properly denied defendant's motion for a directed verdict of acquittal. See *People v Martin*, 271 Mich App 280, 319-320; 721 NW2d 815 (2006) (discussing the standard of review).

Defendant next argues that Offense Variable 10 was improperly scored at 10 points. He asserts that the priest was not a vulnerable victim who was exploited. "'This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score.'" *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005), quoting *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). A trial court's scoring decision "for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). This Court reviews the interpretation of the statutory sentencing guidelines de novo. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

MCL 777.40 provides, in pertinent part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status . . . 10 points
>
> * * *
>
> (d) The offender did not exploit a victim's vulnerability . . . 0 points
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:
>
> * * *
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

Given his age, the priest was clearly encompassed by the term "agedness" in MCL 777.40(1)(b), and his advanced age made him fit within the term "[v]ulnerability" in MCL 777.40(3)(c). In addition, it can reasonably be inferred that defendant exploited the priest's vulnerability by targeting his home.

The presentence investigation report indicates that defendant knew the priest was 84 years old and lived alone. Indeed, the priest testified at trial that he had previously allowed defendant to reside in the apartment after defendant was evicted from a homeless shelter. The priest testified that he had attempted to "talk to him about whatever his problems were and see if I could help him." Defendant then chose to victimize the priest by invading his apartment. The priest attempted to enter the apartment in the course of the crime but was repelled by a chair against the door. Given all the circumstances and reasonable inferences, the trial court's decision was supported by evidence, and reversal is therefore unwarranted. *Endres*, 269 Mich App at 417.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Patrick M. Meter